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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91221844
Party	Defendant Merve Optik Sanayi Ve Ticaret Anonim Sirketi
Correspondence Address	JOHN S EGBERT EGBERT LAW OFFICES PLLC 1314 TEXAS, 21ST FLOOR HOUSTON, TX 77002 UNITED STATES mail@egbertlawoffices.com
Submission	Opposition/Response to Motion
Filer's Name	John S. Egbert
Filer's e-mail	mail@egbertlawoffices.com
Signature	/1285-843/
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Application Serial No. 79/104,357
Published in the Official Gazette on January 6, 2015

Haggar Clothing Co.,	§	
	§	
Opposer,	§	
	§	
v.	§	Opposition No. 91221844
	§	
Merve Optik Sanayi Ve Ticaret Anonim Sirketi,	§	
	§	
Applicant.	§	

APPLICANT'S RESPONSE TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Pursuant to Trademark Rule 2.127 and Rule 56 of the Federal Rules of Civil Procedure, Merve Optik Sanayi Ve Ticaret Anonim Sirketi ("Applicant") by its attorneys, hereby submits the following Response to Haggar Clothing Co.'s ("Opposer") Motion for Summary Judgment. As demonstrated below, Opposer's Motion for Summary Judgment should be denied.

I. FACTS

On September 3, 2015, Opposer filed its Motion for Summary Judgment. Opposer's Motion for Summary Judgment is based upon the theory that res judicata bars registration of Applicant's Trademark Application No. 79/104,357 for the mark "MUSTANG (Stylized)" for use in association with "Spectacle frames; optical goods, namely, eye glasses, eyeglass lenses, sunglasses, lenses for sunglasses, eyeglass cases, eyeglass chains and cords."

II. ARGUMENT

Opposer's Motion for Summary Judgment raises genuine issues of material fact, which must be resolved in Applicant's favor. The facts in the instant proceeding raise issues that cannot and

should not be resolved on Summary Judgment, prior to the time in which discovery will commence. Therefore, Applicant respectfully requests that the Board deny Opposer's Motion for Summary Judgment with respect to the issue of claim preclusion.

A. Summary Judgment Standard

Summary judgment is appropriate only where there are no genuine disputes as to any material facts, thus allowing the case to be resolved as a matter of law. Fed. R. Civ. P. 56(a). Further, a party moving for summary judgment has the burden of demonstrating the absence of any genuine issue of material fact, and that it is entitled to judgment as a matter of law. TBMP § 528.01; *Copelands' Enterprises Inc. v. CNV, Inc.*, 945 F.2d 1563, 20 USPQ2d 1295 (Fed. Cir.1991). When the moving party has supported its demonstrate the existence of a genuine dispute of material fact to be resolved at trial. *Shum v. Intel Corp.*, 633 F.3d 1067, 97 USPQ2d 1513, 1519 (Fed. Cir. 2010); *Enbridge, Inc. v. Excelerate Energy LP*, 92 USPQ2d 1537, 1540 (TTAB 2009). The nonmoving party must be given the benefit of all reasonable doubt as to whether genuine disputes of material fact exist; and the evidentiary record on summary judgment, and all inferences to be drawn from the undisputed facts, must be viewed in the light most favorable to the nonmoving party. *See Opryland USA, Inc. v. Great Am. Music Show, Inc.*, 970 F. 2d 847, 23 USPQ2d 1471, 1472 (Fed. Cir. 1992). The Board may not resolve disputes of material fact on summary judgment; it may only ascertain whether such disputes are present. *See Lloyd's Food Products Inc. v. Eli's Inc.*, 987 F.2d 766, 25 USPQ2d 2027, 2029 (Fed. Cir. 1993); *Opryland USA*, 23 USPQ2d at 1476; *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1544 (Fed. Cir. 1992). A factual dispute is genuine if, on the evidence of record, a reasonable fact finder could resolve the matter in favor of the nonmoving party. *Opryland USA*, 23 USPQ2d at 1472; *Olde Tyme Foods*, 22 USPQ2d at 1544.

Under the doctrine of claim preclusion, "a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." *Jet Inc. v. Sewage Aeration Sys.*, 55 USPQ2d 1854, 1856 (Fed. Cir. 2000) (*quoting Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979)). Therefore, in order for claim preclusion to apply, the following facts must all be met:

(1) identity of parties (or their privies);

(2) an earlier final judgment on the merits of a claim; and

(3) a second claim based on the same set of transactional facts as the first.

Id.

B. Factor One: Identity of Parties - Applicant in the Instant Proceeding is a Different Entity than the Applicant to the Prior Opposition.

A genuine issue of material fact exists as to whether the Applicant in the current opposition is the same entity as the Applicant in the 91185522 opposition ("the '522 opposition"). The Applicant to the '522 opposition was Merve Optik Sanayi Ve Ticaret Limited Sirketi, a corporation of Turkey. *See* [Trademark Opposition No. 91185522]. The Applicant in the current opposition is Merve Optik Sanayi Ve Ticaret Anonim Sirketi, a joint stock company of Turkey. It is mere supposition to assume that because the two entities appear to have the same address that the companies are related or in privity.

Opposer has purported to submit evidence that the Applicant to the '522 opposition is the predecessor to the Applicant in the current opposition. *See* [Opposer's Motion for Summary Judgment, pg 9]. However, an examination of the Opposer's evidence reveals that the Opposer has submitted a document written in Turkish. Without an English translation of the document, Applicant is unable to ascertain the validity of the Opposer's claim. When interpreting the evidence

in the light most favorable to the non-movant, Opposer cannot carry its burden of proof in establishing that the Applicant to the current opposition is the same or related to the Applicant in the '522 opposition. A genuine issue of material fact remains.

C. Factor Two: Earlier Judgment on the Merits.

Whether the judgment in a prior proceeding was the result of a dismissal with prejudice or even default, claim preclusion may still apply. *See, e.g., Orouba Agrifoods Processing Co. v. United Food Import*, 97 USPQ2d 1310 (TTAB 2010) (granting summary judgment to registrant on claim preclusion where petitioner's opposition had been dismissed with prejudice). "[D]efault judgments for failure to answer, or dismissals for failure to prosecute, where there has been no decision 'on the merits,' can act as a bar under the doctrine of claim preclusion." *Orouba Agrifoods Processing Co., 97 USPQ2d at 1313 (citing International Nutrition Co. v. Horphag Research, Ltd.*, 220 F.2d 1325, 55 USPQ2d 1492, 1492 (Fed. Cir. 2000).

The previous '522 opposition was dismissed by the Board, because the Opposer's Motion for Default Judgment was granted as conceded. *See* [TTAB's January 11, 2010 Order in Opposition No. 91185522]. Although such a decision by the Board can serve as the basis upon which claim preclusion may rest, it is important to bear in mind that the Board should exercise caution in asserting claim preclusion. Importantly, the Supreme Court warned against offensive assertion of *res judicata*, which must be examined carefully to determine whether it would be unfair to a party. *See Parklane*, 439 U.S. at 330-32, 99 S.Ct. 645 ("Precedent cautions that *res judicata* is not readily extended to claims that were not before the court, and precedent weighs heavily against denying litigants a day in court unless there is a clear and persuasive basis for that denial.") (internal citations omitted). In accordance with *res judicata* jurisprudence, the Board should proceed carefully and pragmatically before applying the principle, in fairness to the Applicant. Serious consideration

should be given as to whether claim preclusion is appropriate, especially when considering the fact that the Board did not reach a decision on the merits in the '522 opposition.

D. Factor Three: Same Set of Transactional Facts - Applicant's Trademark Application in the Instant Proceeding is Different than the Applicant's Trademark Application in the '522 Opposition.

A genuine issue of material fact exists as to whether the same set of transactional facts are present in the current opposition as in the '522 opposition. The trademark application implicated in the '522 opposition is as follows:

Mark	**Serial No.**	**Filing Date**	**Owner**
	77/013,372	June 8, 2007	Merve Optik Sanayi Ve Ticaret Limited Sirketi
Identification of goods: Spectacles, spectacle cases, sunglasses, frames for spectacles and sunglasses, contact lens and contact lens cases, eyewear accessories, namely, straps, neck cords and head straps which restrain eyewear from movement on a wearer and spectacle chains			

In stark contrast, the trademark application implicated in the current opposition proceeding is as follows:

Mark	**Serial No.**	**Filing Date**	**Owner**
MUSTANG	79/104,357	August 8, 2011	Merve Optik Sanayi Ve Ticaret Anonim Sirketi
Identirfication of Goods: Spectacle frames; optical goods, namely, eye glasses, eyeglass lenses, sunglasses, lenses for sunglasses, eyeglass cases, eyeglass chains and cords			

As can be readily seen, the trademark application implicated in the '522 opposition is wholly different than the trademark application at issue in the current proceeding. As previously explained, the Applicants to the respective trademark applications are different. Furthermore, the marks in question are not the same. The trademark application in the '522 opposition was a stylized mark, in which the term "MUSTANG" appears in cursive and the crossed portion of the letter "t" extends across the term "tang." The trademark application in the current opposition is wholly different in appearance, because it is comprised of block stylized lettering. In addition, the letter "t" does not have a crossed portion that extends across other letters, which contributes to a different commercial impression than the trademark application in the '522 opposition. Finally, the identification of goods for the respective marks is not the same.

III. CONCLUSION

The Opposer cannot carry its burden of proof with regard to the issue of claim preclusion raised in the Opposer's Motion for Summary Judgment. Genuine issues of material fact exist with regard to the Opposer's claims that the Applicant in the current proceeding is the same or in privity with the Applicant in the '522 opposition. Furthermore, Applicant's trademark issue in this proceeding is easily differentiated from the trademark application in the '522 opposition, because of differences in appearance, commercial impression, and the goods contained within the respective applications. Finally, the Board should be extremely cautions in applying claim preclusion, particularly in the current instance when the Board's order in the '522 opposition was based on a failure to respond to a Motion for Summary Judgment rather than a determination on the merits of the filings of the parties.

For the foregoing reasons, Opposer's Motion for Summary Judgment should be denied. Genuine issues of material fact exist in this proceeding.

Respectfully submitted,

October 5, 2015
Date

/1285-843/

John S. Egbert
Reg. No. 30,627
Kevin S. Wilson
Michael F. Swartz

Egbert Law Offices, PLLC
1314 Texas, 21st Floor
Houston, Texas 77002
(713)224-8080
(713)223-4873 (Fax)

ATTORNEYS FOR APPLICANT
Merve Optik Sanayi Ve Ticaret Anonim Sirketi

CERTIFICATE OF SERVICE

I hereby certify that Applicant's Response to Opposer's Motion for Summary Judgment is being sent by first class mail on October 5, 2015, to the correspondence of record for Opposer at the following address:

Paul J. Reilly, Esq.
Baker Botts L.L.P.
2001 Ross Avenue Suite 600
Dallas, TX 75201-2980

ATTORNEYS FOR OPPOSER
Haggar Clothing Co.

/1285-843/
John S. Egbert
Reg. No. 30,627
Kevin S. Wilson
Michael F. Swartz

Egbert Law Offices, PLLC
1314 Texas, 21st Floor
Houston, Texas 77002
(713)224-8080
(713)223-4873 (Fax)

ATTORNEYS FOR APPLICANT
Merve Optik Sanayi Ve Ticaret Anonim Sirketi

JSE:mfs
Our File: 1285-843